

MEMORANDUM OF LAW

DATE: October 12, 1992

TO: Larry B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Legislative Officers' Retirement Plan Vesting
Requirements - San Diego Municipal Code Sections
24.0541 et seq.

Recently you asked for clarification of the vesting requirements for the Legislative Officers' Retirement Plan ("LORP") set forth in San Diego Municipal Code ("SDMC") sections 24.0541 et seq. Specifically, you have asked whether there is any conflict with these requirements as they relate to the vesting provisions set forth in Section 141 of the Charter for the City of San Diego ("Charter section 141"). After reviewing the City's Charter, the LORP and other relevant authority, we conclude that there is no conflict with the vesting provisions set forth in either the Charter or the LORP. Our analysis follows.

BACKGROUND

The LORP was established pursuant to Ordinance No. O-10479 N.S., effective January 12, 1971, to provide, on an optional basis for the Mayor and City Council members who wished to become members of the Retirement System, a separate plan for service and disability retirement. The age and service requirements for the LORP were set forth in SDMC section 24.0545. Substantively, this section has not been amended since its enactment. It provides:

Upon his written application to the Board of Administration, a legislative officer who is a member of this system shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.0546 if the member a) is 60 or more years of age and has 4 or more years of creditable service at retirement, or b) has 20 or more years of creditable service at

retirement, regardless of his age, or
c) has 15 or more years of creditable
service at an age less than 60 with
the retirement allowance reduced by
2% for each year and fractional year
under 60. (Emphasis added.)

As currently drafted, Charter section 141 provides in
pertinent part:

The Council of the City is
hereby authorized and empowered by
ordinance to establish a retirement
system and to provide for death
benefits for compensated public
officers and employees, other than
those policemen and firemen who were
members of a pension system on June
30, 1946. No employee shall be
retired before reaching the age of
sixty-two years and before completing
ten years of continuous service,
except such employees may be given
the option to retire at the age of
fifty-five years after twenty years
of continuous service with a
proportionately reduced allowance.
Policemen, firemen and full time
lifeguards, however, who have had ten
years of continuous service may be
retired at the age of fifty-five
years, except such policemen, firemen
and full time lifeguards may be given
the option to retire at the age of
fifty years after twenty years of
continuous service with a
proportionately reduced allowance.
(Emphasis added.)

The alleged conflict arises in the age and service
requirements set forth in Charter section 141 (age 62, 10 years
of continuous service) and SDMC section 24.0545 (age 60, 4 years
of continuous service). Although at first glance these
provisions appear to suggest a conflict, further review compels a
contrary result.

DISCUSSION

As originally enacted, Charter section 141 empowered the
Council to establish a retirement system for "public employees

other than policeman and fireman (who are now members of a pension system) and elective officers, and members of commissions who serve without pay; . . ." Charter section 141, adopted at General Election on April 8, 1931, approved by the Legislature on April 15, 1931. As can be seen from the foregoing, elective officers and non-compensated commission members were expressly excluded from coverage.

In addition, Charter section 141, as originally enacted, provided further "that in no retirement system, so established shall an employee be retired - except in case of disability, incapacitating the employee for the performance of his duties - before he reaches the age of sixty-two and before ten years of continuous service; . . ." (Emphasis added.) A similar 10-year limitation was placed on safety members who were age fifty-five. Separate age restrictions (general members - age 50, safety members - age 55) were imposed for twenty years of service.

Charter section 141 was subsequently amended on June 8, 1954, effective January 10, 1955. According to this amendment, the previously used term "public employee" was changed to "compensated public officers and employees," In addition, the previous exclusion from coverage in the Retirement System for elective officers and non-compensated commission members was removed. The age and service requirements for general and safety member employees set forth above remained. Significantly, however, neither age nor service requirements were introduced for the newly included "compensated public officers."

Since the Charter is silent on the terms and conditions for service retirements for "compensated public officers," the real issue is whether the Council had the authority in 1971 when enacting Ordinance No. O-10479, N.S., establishing the LORP, to set age and service requirements different than those set for City "employees" in Charter section 141. We conclude that the Council did have such authority. The age and service requirements set forth in SDMC section 24.0545 are lawful. Longstanding rules of statutory construction support our conclusion.

Generally speaking, "the city charter represents the supreme law of the city, subject only to conflicting provisions in the state and federal constitutions, or to preemptive state or federal law. The charter supersedes all municipal laws, ordinances, rules or regulations that are inconsistent with its provisions." 2 McQuillin, *The Law of Municipal Corporations* 841 (3d ed. 1988).

Specifically, Article XI, section 5, subdivision (b) of the state constitution gives full power to charter cities to provide

for the compensation of their employees. In this context, "First is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution." (Citation omitted.) *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 37 (1979).

With respect to well-settled rules of statutory construction involving our City's Charter, the Court of Appeal has held:

The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. ¶Citations.σ . . . All rules of statutory construction as applied to charter provisions ¶citationsσ are subordinate to this controlling principle A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied. ¶Citations.σ

Id. at 38.

In approaching our task of construing Charter section 141, we are further guided by additional principles of statutory construction. They include:

¶Effect should be given, if possible, to every section, paragraph, sentence, clause and word in the instrument and related laws When the words used are explicit, they are to govern Words must be interpreted in the sense in which they are ordinarily used and understood, unless some other interpretation is clearly indicated by the charter.

2 McQuillin, The Law of Municipal Corporations 916 (3d ed. 1988).

Applying these principles to the age and service requirements for "employees" set forth in Charter section 141 and the age and service requirements for legislative members (compensated public officers) in SDMC section 24.0545, we find no conflict between these provisions. The statutory scheme under scrutiny provides for the establishment of a retirement system for "compensated public officers" and "employees" by the city council through ordinance. Charter section 141. Importantly, Charter section 141 expressly identifies two separate classifications of public employment.

In this regard, we note "a distinction is commonly drawn between a public officer and a public employee. A person is not a public officer unless he holds a 'public office' created by the Constitution or some legislative body, the office existing independently of the person in it." Witkin, Summary of California Law Agency and Employment Section 8 pp. 25-26. Specifically,

A public officer is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting.

Sharpe v. City of Los Angeles, 136 Cal. App. 732, 737 (1934).

In light of the real and substantial differences between public officer and public employee, the City Charter's express use of both terms, and the principles of statutory construction outlined above, we conclude that the express limitations imposed on service retirements for employees do not apply equally to compensated public officers. Our inquiry does not stop here, however. Charter section 146 further empowers the council "to

enact any and all ordinances necessary, in addition to the ordinance authorized in Section 141 of this Article, to carry into effect the provisions of this Article; . . ." Moreover, "any and all ordinances so enacted shall have equal force and effect with this Article and shall be construed to be a part hereof as fully as if drawn herein." Charter section 146.

Although age and service limitations were placed on service retirements for "employees," no such limitations were placed on service retirements for "compensated public officers." Not faced with any such limitations or restrictions and pursuant to the authority set forth in Charter section 146, the Council had the power to establish different age and service requirements for service retirements for its elected members who elect to join the Retirement System.

CONCLUSION

The LORP, established by Ordinance No. O-10479, N.S., effective on January 12, 1971, was validly enacted pursuant to the Council's authority under Charter sections 141 and 146. Absent any Charter-imposed restrictions based on age or service for compensated public officers, the Council was free to establish the criteria for service retirements for its members who subsequently elected to join the Retirement System.

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